CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by the City of Walnut Creek concerning the Memorandum of June 28, 1989 entitled "Payment of and Reserving for Statutory Salary Continuation Benefits" issued by the Department of Industrial Relations, Office of Self-Insurance Plans[1]	1990 OAL Determination No. 10 [Docket No. 89-017] June 11, 1990 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

Determination by:

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether certain policies pertaining to reserving, paying and reporting salary continuation benefits for certain disabled employees (for instance, city police, local firefighters and sheriff's officers) are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that these policies are indeed "regulations" required to be adopted in compliance with the Administrative Procedure Act. It should be noted that one key requirement (that local governments must reserve funds for salary continuation payments) has apparently been rescinded by the Department or Industrial Relations.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether or not the policies contained in the June 28, 1989 Memorandum ("Memorandum") issued by the Department of Industrial Relations, Office of Self-Insurance, ("the Department") entitled "Payment of and Reserving for Statutory Salary Continuation Benefits," are "regulations" required to be adopted pursuant to the Administrative Procedure Act.[4] The Memorandum required public self-insurers to reserve for payment, salaries of specific workers (e.g, city police, firefighters, and sheriff's employees) who are entitled to elect salary in lieu of temporary disability benefits. In addition, the Memorandum required these public employers to report these salary benefits in claim files and in their Self-Insurers' Annual Report.

THE DECISION [5,6,7,8,9]

OAL finds that:

(1) the Department's rules concerning workers' compensation insurance and security are specifically required to be adopted pursuant to the Administrative Procedure Act ("APA");

(2) the policies contained in the Memorandum are "regulations" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) the policies contained in the Memorandum do not fall within any established exception to the APA; and therefore,

(4) the Memorandum violates Government Code section 11347.5, subdivision (a) in that it (1) requires public sector self-insurers to reserve salary continuation benefits and (2) requires the self-insurers' annual report and claim files to reflect salary benefits due (in lieu of temporary disability benefits) to claimants.

REASONS FOR DECISION

I. AGENCY; AUTHORITY; BACKGROUND

Agency

California's workers' compensation law (formerly "workman's" compensation), enacted in 1911 and since frequently amended, imposes liability on the employer, irrespective of fault, for any injury or death sustained by the employee in the course of employment and entitles the injured employee to specific treatment and financial benefits. In addition, the employer cannot be sued for the negligence which caused the workers' occupational injury or death. Furthermore, current law requires employers to have adequate insurance coverage against the liability to compensate workers.

A cabinet-level agency, the Department of Industrial Relations ("the Department") was created in 1921. It was originally called the Department of Labor and Industrial Relations.[10] In 1927, the Legislature gave the agency its present name.[11] The Office of Self-Insurance Plans ("Office") is within the Department and is responsible for the administration and regulation of employers that are self-insured for workers' compensation claims.[12]

Title 8, California Code of Regulations ("CCR"), subsection 15201(d) defines the managing entity of the Office:

> "Manager means the Manager, Self-Insurance Plans (workers' compensation)."

The Manager coordinates and oversees the administration of employers who are self-insured for workers' compensation liability.

Among its many duties, the Office conducts audits for the purpose of "addressing the adequacy of estimates of future liability of claims for all self-insured employers. . . ."[13] (Emphasis added.)

Authority[14],[15]

Labor Code section 3702.10 provides the Department with specific rulemaking authority concerning workers' compensation insurance and security. Section 3702.10 states in part:

> "The director, in accordance with [the APA], may adopt, amend and repeal rules and regulations reasonably necessary to carry out the purposes of

section 129 and article 1 [Insurance and Security]. . . , article 2 [Uninsured Employers Fund]. . . , and article 2.5 [Self-Insurers' Security Fund]. . . . This authorization includes, but is not limited to, the adoption of regulations to do all of the following:

(a) Specifying what constitutes ability to self-insure and to pay any compensation which may become due under section 3700.

. . . .

(c) Specifying what constitutes a failure or inability to fulfill the employer's obligations under Section 3702.

(d) Interpreting and defining the terms used.

. . . .

(f) Specifying the standards, form, and content of agreements, forms, and reports between parties who have obligations pursuant to this chapter. . . ."

Regulations of the Office are set out in Title 8, CCR, sections 15200-15463. (All further references to CCR sections will be to Title 8, unless otherwise indicated.)

Background

To facilitate understanding of the issues presented in this Determination, we set forth the following relevant statutes and regulations and undisputed facts.

The Department issued the Memorandum signed by the Manager of the Office, explaining that the Workers' Compensation Act ("Act") sets the maximum temporary disability rate at two-thirds of $336 per week, or $224. The Memorandum further explained that various employee members of the Public Employees Retirement System, State Teachers' Retirement System and certain law enforcement personnel, firefighters and lifeguards are statutorily entitled to salary continuation in lieu of the temporary disability benefits. The Memorandum then stated that public self-insurers must reserve for and pay statutory salary continuation payments. In addition, statutory salary continuation benefits must be reflected in the claim files and in the Self-Insurers' Annual Reports.

STATUTES

A number of statutes govern this area. Labor Code section 3700 requires each employer, except the State, to secure the payment of compensation by either being insured or obtaining consent from the Director of Industrial Relations to self-insure.[16]

Labor Code section 3702.2 requires all self-insured employers to file a report annually in a form prescribed by the Director.

Labor Code section 3207, virtually unchanged (with the exception of adding vocational rehabilitation as a benefit in 1965) since adoption of the Act in 1917, defines "compensation" as every benefit, including vocational rehabilitation, conferred by Division 4 of the Labor Code, which concerns workers' compensation and insurance.

Labor Code section 4850 provides for salary continuation payments to certain "safety" employees disabled in the course of their duties.[17]

Government Code section 19871 provides for salary continuation payments (in lieu of workers' compensation temporary disability payments) to state officers and employees disabled in the course of employment.[18]

Education Code section 89529.03 provides for salary continuation payments (in lieu of workers' compensation temporary disability payments) for specific employees of the California State University Trustees, disabled in the course of state employment.[19]

REGULATIONS

A number of duly adopted regulations also govern this area. Pertinent departmental regulations are contained in "Group 2" of the Department's regulations, which is entitled "Administration of Self-Insurance".

CCR section 15210 limits the need for a surety bond to private self-insurers by requiring consistency with Labor Code section 3701, which establishes the security for payment of compensation provisions for private self-insurers. Section 15210 provides as follows:

> "As a condition precedent to the issuance of a certificate, the employer, upon notification from the Director, shall deposit, in accordance with the provisions of Section 3701, Labor Code, in an amount specified by the Director, and in his discretion, a surety bond or approved securities. A surety bond

shall be written upon forms provided by the Director." [Emphasis added.]

Similarly, CCR section 15250 restricts the amount of any required security deposit by referring to the Labor Code provision that specifies an amount for private self-insurers only. Section 15250 provides:

"Required Deposit. The required deposit shall be equal to or greater than 100 percent of the self-insurer's future liabilities for the payment of compensation; but in no event shall the deposit be less than the amount required by Labor Code Section 3701. The required deposit may be increased at the Director's discretion. Said future liability may be ascertained by the Director from any relevant source." [Emphasis added.]

There are three regulations governing the reporting requirement in the instant case. First, CCR section 15251, requiring an annual report, states:

"Annual report. Every self-insurer shall file a Self-Insurers' Annual Report on forms supplied by the director as a condition to the continued holding by the self-insurer of a certificate. . . ."

Second, CCR section 15252, which requires an estimate of future liability, sets forth the Annual Report Form. Third, CCR subsection 15300(a) establishes the basis for determining the future liability computations as those computations which will determine compensation costs potentially due. Subsection 15300(a) provides:

"Each indemnity case listed on the annual report shall be estimated on the basis of computations which will develop the total future cost of compensation benefits due or potentially due."

Finally, CCR subsection 15201(b) defines "compensation" as it is described in Labor Code Section 3207 for workers' compensation.

UNDISPUTED FACTS

The following facts are undisputed.

(1) The City of Walnut Creek ("the City") is a public sector employer, self-insured for purposes of workers' compensation.

(2) The Department in a June 28, 1989 memorandum, entitled "Payment of and Reserving for Statutory Salary Continuation Benefits" addressed to "All Public Sector

Self-Insurers and all Third Party Administrators," advised certain public agencies (including the City) of their duties regarding salary continuation payments owed to certain classes of employees in lieu of workers' compensation temporary disability payments.

(3) The Department requires public sector self-insurers to report, reflect in their claim files, and reserve salary continuation payments made or potentially owed "state officers and employees"[20] or "state university employees" as workers' compensation benefits.[21]

(4) The Department requires public sector self-insurers to report and reflect in their claim files salary continuation payments made or potentially owed to "safety employees"[22] as workers' compensation benefits.

(5) Many public agencies have been self-insured for a number of years and have neither reserved nor reported in their annual reports to the Department, salary continuation payments due or potentially due to "safety employees, state officers and employees or state university employees" as workers compensation payments.[23]

Background: This Determination

On September 18, 1989, Thomas Haas, City Attorney for the City of Walnut Creek, submitted to OAL a Request for Determination.

The Requester stated that the City, in its role as a self-insurer for purposes of workers' compensation, received a memorandum from the Department requiring (among other things) that the City include as part of its self-insured workers compensation reserves, salary continuation payments made in compliance with Labor Code section 4850. Requester further alleged that the Department was requiring self-insuring public agencies to pay and report these salary continuation payments to the Department. Additionally, Requester stated that these requirements were newly imposed without the benefit of a notice or a rulemaking procedure.

On March 2, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register[24], along with a notice inviting public comment.

On April 13, 1990, the Department filed a Response to the Request with OAL.

II. ISSUES

Reviewing the Request and the Department's Response, there appears to be some need for clarification of (1) whether the Memorandum did in fact purport to impose a "reserve" requirement and (2) precisely which departmental policies are at issue here. We will discuss the first topic first.

RESERVE REQUIREMENT

The Memorandum was sent with an attached Memorandum of Law ("the legal memo") prepared by a legal advisor, presumably an attorney. In the legal memo (dated May 1989), the attorney analyzed the issue of whether the liability for various types of salary continuance should be included in reserves. The legal memo concluded that salary continuation payments made pursuant to various statutes and in lieu of temporary disability payments should be included in reserves as "compensation" as the term "compensation" is defined under the workers' compensation laws.

In making this analysis and in discussing "reserves," the legal memo refers specifically to and quotes the requirements of Labor Code section 3701, which requires private self-insuring employers to secure[25] liability for payment of "compensation" by making a deposit of security. The Manager of the Office, by attaching the legal memo to the Memorandum and applying the legal memo's conclusion to public self-insurers, indicated that the Department was requiring "reserves" (the setting aside of funds) for payment of statutory salary continuation payments. By applying the private self-insurer reserve requirements to public self-insurers, this Memorandum blurred the distinction between private self-insured employers and public self-insured employers.[26]

Though the Department has subsequently denied requiring public self-insurers to actually set aside funds for payment of statutory continuation payments, a reasonable interpretation of the Memorandum is that the Department did in fact require the establishment of such reserves.[27] The plain meaning of the term "reserve" is as follows:

> "To keep back or save for future use or a special purpose.
>
> To set apart for a particular person or use.
>
> An amount of capital held back for investment by a bank or company in order to meet probable or possible demands."[28]

We note that the Department believed that the City had interpreted the Memorandum to require the setting aside of funds.[29]

If the Memorandum was attempting to confine its policy to that of a reporting requirement only--as the Department now argues--then the Department would not have followed its statement of the need for public insurers to "reserve for and pay . . . 'salary in lieu of temporary disability benefits' . . ." with the following sentence:

> "In addition, claim files and Self-Insurers Annual Reports must reflect the statutory benefits due claimants where the claimant is entitled to receive salary in lieu of temporary disability." [Emphasis added.]

Though the Department does not explicitly say so, it seems reasonable to conclude that it has now rescinded the "reserve" requirement.[30] We are, in any event, required to determine whether or not the "reserve" requirement as articulated in the Memorandum should have been adopted pursuant to the APA.

Having clarified the status of the "reserve" requirement, we now turn to an examination of the three distinct rules contained in the memorandum.

THREE DISTINCT RULES

Rule No. 1
Public self-insurers shall reserve for and pay salaries which employees may elect to receive pursuant to (1) Labor Code section 4850, (2) Government Code section 19871, or (3) Education Code section 89529.

Rule No. 2
Self-insurers' claim files shall reflect statutory salary continuation benefits due claimants when the claimant is entitled to receive (1) salary pursuant to Labor Code section 4850 or (2) salary in lieu of workers' compensation temporary disability payments pursuant to Government Code section 19871 or Education Code section 89529.

Rule No. 3
Self-insurers' annual reports shall reflect statutory salary continuation benefits due claimants when the claimant is entitled to receive (1) salary pursuant to Labor Code section 4850 or (2) salary in lieu of workers' compensation temporary disability payments pursuant to Government Code section 19871 or Education Code section 89529.

The three main issues before us are:[31]

(1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

(2) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."[32] Since the Department is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.[33]

We are aware of no specific[34] statutory exemption which would permit the Department to conduct rulemaking without complying with the APA. Indeed, Labor Code section 3702.10, quoted above under the subheading "Authority," specifically requires the Director to adopt regulations concerning compensation insurance and security in accordance with the APA. The Department claims no exemption and indeed alleges that it has "duly" adopted regulations to implement its reporting requirement.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or

> other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in the key provision of Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the challenged rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency or
- govern the agency's procedure?

STANDARD OF GENERAL APPLICATION

The answer to the first part of the inquiry is "yes" as to all three challenged rules. For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[35]

The Memorandum is addressed to "All Public Sector Self Insurers and All Third Party Administrators," and concerns "Payment of and Reserving for Statutory Salary Continuation Benefits." (Emphasis added.) It states in part:

> "Our office has noticed particular problems in recent public sector audits regarding proper payment of and reserving for Statutory Salary Continuation payments owed to safety employees in lieu of temporary disability.
>
> ". . . .
>
> "[V]arious employee members of the Public Employee Retirement System and State Teacher's Retirement System and certain law enforcement, firefighters and lifeguards are statutorily provided the benefit of

salary continuation in lieu of temporary disability benefits.

"Public self insurers will need to reserve for and pay the higher 'salary in lieu of temporary disability benefits' where applicable. In addition, claim files and Self Insurer's Annual Reports must reflect the statutory benefits due claimants where the claimant is entitled to receive salary in lieu of temporary disability.

". . . .

"With the permission of the California Administrative Service Organization (CASO), we are providing for your information the attached Memorandum of Law prepared by CASO's legal advisor, Grandell, Lebovitz, Stander, Marx and Greenberg.

"Self Insurance Plans agrees with the attached Memorandum that reserving for benefit payable under Labor Code Section 4850, Government Code Sections 19869 et seq. and Education Code 89529 et seq. is statutorily required for all qualifying claimants. . . ." [Emphasis added.]

The policies challenged in the Request thus apply to all public sector self-insurers and all third party administrators. Additionally, whether the action of a state agency constitutes a "regulation" hinges largely upon the effect and impact upon the public.[36] These policies will affect the content of these employers' files and reports and will determine how funds are managed. These factors alone will have a significant impact upon the expenses incurred by the public self-insured employers in terms of costs of administration, having a resulting effect upon the annual budgets of those cities, counties, and municipalities which self-insure. Therefore, the policies challenged in the Memorandum are rules of general application.

Having established that the challenged policies are rules of general application, we now inquire whether these rules have been adopted by the Department to implement, interpret, or make specific the law enforced or administered by the Department.

IMPLEMENT THE LAW

All three of the challenged rules implement, interpret and make specific the law enforced and administered by the Department.

The Department acknowledges that it is charged with the responsibility of administering the law as it relates to

workers' compensation insurance and security. Under the Labor Code, the Director determines what constitutes adequate security, establishes guidelines for determining an entity's right to self-insure, revokes an entity's right to self-insure and adopts, amends and repeals regulations governing: (1) workers' compensation insurance and security, (2) the uninsured employers' fund and (3) the self-insurers' security fund.[37]

First, we examine the question as it relates to challenged Rule No. 1. Challenged rule no. 1 has two elements, (a) a reserving and paying element and (b) a statutory salary benefit element.

Rule No. 1

A. Reserving Element

The Department points out that Labor Code section 3700 requires every employer to secure payment of "compensation" and provides for self-insurance, subject to provisions for revocation of the right to self-insure for good cause.[38] "Compensation" is defined in Labor Code section 3207 and Hawthorne v. City of Beverly Hills,[39] to include salary continuation benefits under Labor Code section 4850. By requiring the "reserving and paying" of salary continuation benefits for "safety employees", "state officers and employees" and "State University employees"[40], the Department was interpreting and making specific Labor Code sections 3700, 3702, 3207 and 4850.[41]

Analysis of the Department's First Argument (Rule No. 1)

The Department asserts that requiring the City (and other public self-insurers) to include statutory salary continuation payments as part of their workers' compensation reserves is not a new regulatory requirement, but an existing statutory requirement. In this regard, the Department contends:

> "LC section 3700 requires every employer to secure the payment of compensation and provides for 'self-insurance' for cities, etc., subject to the provisions of LC section 3702. LC section 3702 provides for revocation of an entity's right to self-insure for good cause. Good cause, includes, among other things, the failure to maintain a security deposit as required by section 3701." [Emphasis added.]

Examining these arguments, we find that Labor Code section 3700 does require every employer except the state to secure the payment of compensation. However, securing the payment of compensation does not necessarily require the establishment of reserves. According to Labor Code section

3700, the securing for payment can be accomplished in one or more ways:

> "(a) By being insured. . . .
>
> "(b) By securing from the [Director] . . . a certificate of consent to self-insure, which may be given upon furnishing proof . . . of ability to self-insure and to pay any compensation that may become due to his employees.
>
> "(c) For any county, city, city and county, municipal corporation, . . . by securing from the Director . . . a certificate of consent to self-insure . . . which certificate may be given upon furnishing proof . . . of ability to administer workers' compensation claims properly, and to pay workers' compensation claims that may become due to its employees. . . ."

Labor Code section 3702 does indeed provide for revocation of the right to self-insure for good cause. According to section 3702, good cause does include the failure to maintain a security deposit as required by Labor Code section 3701. However, Labor Code section 3701 requires security deposits of private self-insuring employers. Labor Code section 3701 states in part:

> "(a) Each year every private self-insuring employer shall secure incurred liabilities for the payment of compensation and the performance of the obligations of employers . . . by renewing the prior year's security deposit or by making a new deposit of security. . . .
>
> "(b) The minimum deposit shall be one hundred twenty-five percent of the private self-insurers' estimated future liability for compensation to secure payment of compensation plus. . . ." [Emphasis added.]

Labor Code section 3701 requires self-insurers to maintain "reserves" for the payment of workers compensation benefits and limits the requirement to private self-insuring employers. There is no requirement that public self-insurers maintain "reserves" for workers' compensation benefits. In fact, the Department admits in its Response that section 3701 requires only private sector self-insurers to post a minimum deposit based upon the self-insurers' future liability for compensation. Public sector agencies do not post such deposits.

In fact, when section 3701 was amended by the Legislature in 1978, it was the Legislature's intent not to require public self-insuring employers to maintain reserves for payment of workers' compensation benefits to the Department.[42] The

1978 amendment adding public insurers to the Workers' Compensation Act amended section 3701 by inserting the word "private" between "every" and "self-insuring employer"--which words preceded the provisions requiring a security deposit.

If the statute does not require the establishment of reserves, the Department's policy cannot be an existing statutory requirement. Therefore, there is no support for the argument that the Memorandum is merely restating the existing law regarding the inclusion of statutory salary continuation payments as part of workers' compensation reserves.

B. Salary Benefit Element of Rule No. 1

Since the Department contends that "Paying and Reserving" salary continuation payments is required by the Workers' Compensation Act, we also address the question of whether or not the benefits payable under Labor Code section 4850, Government Code sections 19871, and Education Code sections 89529.03 are deemed "compensation." What Act requires is the payment of "compensation."

Labor Code section 3207 defines "compensation" as follows:

> "'Compensation' means compensation under Division 4 [Workers' Compensation and Insurance] and includes every benefit or payment conferred by Division 4 upon an injured employee, including vocational rehabilitation, or in the event of his death, upon his dependents, without regard to negligence."

In the often cited case of Hawthorne v. City of Beverly Hills[43] the Court wrote:

> "The term 'compensation' is a technical one and includes all payments conferred by the act upon an injured employee. 'Compensation' of an employee in the form of wages or salary for services performed, does not have the same meaning as the word 'compensation' in the Workmen's Compensation Act. The former is remuneration for work done; the latter is indemnification for injury sustained. Wages and salary may, under some circumstances, be paid as compensation in lieu of the normal temporary disability payments prescribed by the act. Such payments do not constitute salary or gratuities, but are payments of compensation under the act." [Emphasis added.]

A number of cases, many of which are cited in the "Memorandum of Law," conclude that payments made pursuant to Labor Code section 4850 constitute workers' compensation benefits.[44]

None of the cases directly supports the view that payments made under Government Code section 19871 or Education Code section 89529.03 are "compensation." The Court in the Hawthorne case based its analysis in large part upon the fact that section 4850 is contained within division 4 of the Labor Code. The Court wrote:

> "The Workmen's Compensation Act is division IV of the Labor Code. 'Compensation' means compensation under division IV and includes every benefit or payment conferred by that division upon an injured employee. Part 2 of division IV treats [the] . . . computation of compensation. Chapter 2 of part 2 (§§4550-4854) is titled 'Compensation Schedules.' Section 4550 provides that where liability for compensation exists under the act, such compensation shall be furnished or paid by the employer and shall be as provided in chapter 2, which includes section 4850 . . . ."[45]

Government Code[46] payments to "state officers and employees" or Education Code[47] payments to "state university employees" are similar to payments made under Labor code section 4850 to "safety employees" to the extent that they are made in lieu of temporary disability payments." However, such payments under the Government Code and under the Education Code do not constitute a benefit or payment conferred by Division 4 of the Labor Code.

A key issue in this determination is whether or not the statement "reserving for benefit[s] payable under Labor Code section 4850, Government Code section 19671, and Education Code section 89529.03 is statutorily required for all qualifying claimants. . . " is the only legally tenable interpretation of the underlying law.[48] In light of our review of the Court's opinion in Hawthorne, we conclude that there is more than one legally tenable interpretation of what constitutes "compensation"; therefore, the Department may not rely upon the argument that its Rule No. 1 merely restates existing statutory law. Rule No. 1 is a regulation which implements, interprets and makes specific the underlying statutory law.

Analysis of the Department's Second Argument (Rule No. 1)

The Department argues that the Memorandum does not actually require the reservation of funds by means of setting aside funds in a dedicated account, rather that the term "reservation" means "provide for the salary continuation payments by continuing to provide for the positions in their budget." Typically, public insurers provide for the salaries of employees in the public agency's annual budget. The salaried positions cannot be deleted because the eligible employees collecting statutory salary continuation

payments are typically on leave. Thus, the employee is still occupying the position. Requiring the deposit of full salaries of certain employees could result in double budgeting of such funds. Since the City and other public self-insurers are already "reserving" salary continuation payments in the manner that the Department now states it is requiring, there is no need for the Department to require "reserves" in the form of depositing funds in a dedicated account. The Memorandum specifically states that the reason for the Memorandum is that public self-insurers have not been providing "reserves." The Department's argument is simply without merit.

Next we examine challenged Rule No. 2. Rule No. 2 requires claim files to reflect salary continuation benefits when claimants are entitled to elect them.

Rule No. 2

Analysis of the Department's First Argument (Rule No. 2)

The Department asserts that its Memorandum merely reminds public self-insurers of the existing statutory requirement and obligation to report workers' compensation liabilities and benefits paid.

Rule No. 2 is not merely a departmental expression of existing statutory law. Neither Labor Code section 3702.3 nor Labor Code section 3702.9 substantially supports the position that the reporting requirement of Rule No. 2 is mandated by statute. Labor Code section 3702.3 provides for the assessment of penalties for failure to submit information. Section 3702.3 states in part as follows:

> "Failure to submit reports or information as deemed necessary by the director to implement the purposes of section 3701 [private self-insuring employer deposits of security], 3702 [revocation of certificates to self-insure], or 3702.2 [self-insurer's annual report] may result in the assessment of a penalty. . . ."

Likewise, section 3702.3 does not require, as the Department does in its Memorandum, that the claim files reflect statutory salary continuation benefits (or temporary disability benefits for that matter).

Finally, Labor Code section 3702.9 specifies additional penalties for the violation of obligations. Section 3792.9 states in part:

> "(a) . . . the director may . . . enter an order against any self-insured employer . . . directing compliance, restitution for any losses, and a civil penalty in an amount not to exceed the following:

. . . .

(4) Where the failure was by an employer which knew or reasonably should have known of the obligation . . . .

(5) Where the failure was malicious, fraudulent, in bad faith, or a repeated violation. . . ."

Again, we note that the statute does not require--as the Department does in the Memorandum--that claim files reflect salary continuation benefits (or temporary disability benefits). Therefore, the Department's argument that the Memorandum is merely a reminder to all public self-insured employers of their statutory duty is without merit. This rule also implements, interprets and makes specific the law administered by the Department.

Analysis of the Department's Second Argument (Rule No. 2: concerning claim files)

The Department asserts that Rule No. 2 is merely a restatement of the Department's duly adopted regulations. A review of the Department's regulations concerning administration of self-insurance reveals that the Department has indeed adopted regulations relevant to self-insurers' files and annual reports. Self-insurers are presently required by regulation to maintain claim files.[49] We take notice of the fact that the term "claim" file means the same as the term "case" file.

CCR section 15400 requires every self-insurer to maintain a case file of each work injury case. An estimate of future liability must be either noted in the case file or identified with it.

Section 15400 states in part:

"Case File. Every self-insurer shall keep and maintain a case file of each work-injury case, including those cases which were denied. Said case file shall contain, but not be limited to, a copy of

". . . .

"(g) An appropriate estimate of future liability shall be established and maintained for each indemnity case and shall be noted in the case file or identified with the case file." [Emphasis added.]

Though section 15400 appears to require an estimate of future liability and the maintenance of such liability for each indemnity case, it contains no express requirement that

the claim file contain statutory benefits "due." The self-insurer is given the option of noting an estimate of future liability in the case file or simply identifying the estimate of future liability with the case file. Therefore, the requirement expressed in Rule No. 2 requiring claim files to reflect statutory benefits due to claimants when the claimant is entitled to receive salary in lieu of temporary disability payments, supplements the existing statutory and regulatory requirements. Assuming arguendo that section 15400 did require claim files to reflect statutory benefits due to claimants, this regulation would not require inclusion of the salary benefits mandated by Government Code section 19871 or Education Code section 89529.03 because as previously explained, such benefits do not constitute "compensation" within the meaning of the Workers' Compensation Act. We also note that the Department has not prior to the Memorandum required the reporting of statutory continuation payments in its claim files.

Therefore, Rule No. 2 is more than a restatement of a previously adopted regulation, it is a new "regulation" which must be properly adopted.

Rule No. 3

Finally, we examine challenged Rule No. 3. This rule requires annual reports to reflect salary continuation benefits when claimants are entitled to select them.

Analysis of the Department's First Argument (Rule No. 3)

Again, the Department asserts that this reporting requirement is an existing statutory requirement, not a new regulation.

It is true, as the Department asserts, that Labor Code section 3702.2 requires all self-insurers (public and private) to file an annual report. Labor Code section 3702.2 states as follows:

> "All self-insured employers shall file a self-insurers annual report in a form prescribed by the Director." [Emphasis in original.]

The statute does not specify the form of this report. The precise format is left for the Director to determine. However, Labor Code section 3702.2 does not require, as the Department does in the Memorandum, that the annual reports reflect statutory salary continuation benefits (or temporary disability benefits, for that matter) as incurred or potential liabilities.

Neither Labor Code section 3702.3 nor Labor Code section 3702.9 substantially supports the position that the

reporting requirement of Rule No. 3 is mandated by statute. Labor Code section 3702.3 provides for the assessment of penalties for failure to submit reports or information. Section 3702.3 states as follows:

> "Failure to submit reports or information as deemed necessary by the director to implement the purposes of section 3701 [private self-insuring employer deposits of security], 3702 [revocation of certificates to self-insure], or 3702.2 [self-insurer's annual report] may result in the assessment of a penalty. . . ."

Similarly, section 3702.3 does not require, as the Department does in its Memorandum, that annual reports reflect statutory salary continuation benefits (or temporary disability benefits, for that matter).

Finally, Labor Code section 3702.9 specifies additional penalties for the violation of obligations. Section 3792.9 states in part:

> "(a) . . . the director may . . . enter an order against any self-insured employer . . . directing compliance, restitution for any losses, and a civil penalty in an amount not to exceed the following:
>
> (1) For a failure to file a complete or timely annual report . . . .
>
> . . . .
>
> (4) Where the failure was by an employer which knew or reasonably should have known of the obligation . . . .
>
> (5) Where the failure was malicious, fraudulent, in bad faith, or a repeated violation. . . ."

Again, we note that the statute does not require--as the Department does in the Memorandum--that annual reports reflect salary continuation benefits (or temporary disability benefits). Therefore, the Department's argument that the Memorandum is merely a reminder to all public self-insured employers of their statutory duty also is without merit.

Analysis of the Department's Second Argument (Rule No. 3)

The Department argues in the alternative that Rule No. 3 has been duly adopted as a regulation. CCR section 15251 requires every self-insurer to file a self-insurer's annual report. The form of the annual report has been adopted as a regulation and published as CCR section 15252. Part A of the Annual Report form requests information concerning the

self-insurers' incurred liability for benefits, benefits paid to date and future liability as to specific numbers of cases. Part IV of the Annual Report form requires the self-insurer to list open indemnity cases and indicate for each named claimant the amount of benefits paid and the estimated future costs. Subsection 15300(a) requires the self-insurer to estimate the total future costs of compensation benefits due or potentially due when completing Part IV of the Annual Report. The Department has further adopted a regulation defining "compensation" to mean ". . . compensation as defined in section 3207 of the Labor Code." Since Labor Code section 3207 defines "compensation" to include benefits covered by Labor Code section 4850, the Department's argument has some merit but only to the extent that the report requires information regarding Labor Code section 4850 benefits.

Although the portion of Rule No. 3 that requires the public self-insurer to include Labor Code section 4850 benefits as part of the annual report could be interpreted to come within the scope of an existing regulation, that conclusion does not end our analysis. We must determine whether Rule No. 3 is the only viable interpretation of the Department's regulation (CCR, sec. 15252, "annual report forms"). Our response to this inquiry, in spite of the decision in Hawthorne, is a resounding "no."

The Department adopted CCR sections 15251 (annual report) and 15252 (annual report form) in 1972 and last amended section 15252 in 1978. At the time the Department adopted and amended the regulations, the Hawthorne case (decided in 1952)--upon which the Department relies--already provided some judicial guidance as to whether specific benefits (salary continuation benefits pursuant to Labor Code section 4850) to workers constituted workers' compensation. Confusion over the proper interpretation of Labor Code section 4850 for reporting purposes still existed as evidenced by the Department's request for a Legal Memo in 1989 and its failure to require the reporting of salary continuation payments as workers' compensation benefits prior to 1989. The Department obviously interpreted the law differently prior to 1989 than it chooses to interpret it now.

A change in interpretation is permissible. However, in order to accomplish this change the Department must comply with the rulemaking procedures of the APA.[50] The initiation of rulemaking procedures is required in this instance because: (1) the judicial interpretation of the underlying statutes existed before the Department adopted its regulation to implement the statutes and (2) in spite of the existing judicial interpretation, the Department adopted and enforced the current regulation giving the underlying statutes an interpretation which differed from the judicial

opinion. The Department's adoption of a different interpretation (i.e., salary continuation benefits do not constitute "compensation" for purposes of reporting) of the statutes, subsequent to the judicial interpretation, evidences the existence of more than one legally tenable interpretation of the underlying law.[51] Thus, the change in interpretation (in the form of Rule No. 3) constitutes a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b).

As previously discussed, payments pursuant to Government Code section 19871 and Education Code section 89529.03 do not come within the scope of the term "compensation" as defined by Labor Code section 3207 and therefore do not constitute compensation for purposes of CCR sections 15252 and 15300(a). Therefore, we must conclude that the portion of Rule No. 3 that relates to payments made pursuant to Government Code section 19871 and Education Code section 89529.03 supplements the existing regulatory requirements thereby creating a new "regulation" which must be properly adopted.

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless they have been expressly exempted by statute from the application of the APA.[52] Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.[53]

None of the recognized general exceptions (set out in footnote 53) apply to the challenged guidelines.

V. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) the Department's rules concerning workers' compensation insurance and security are specifically required to be adopted pursuant to the APA;

(2) the Memorandum is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) the Memorandum does not fall within any established exception to the APA; and therefore

(4) the Memorandum violates Government Code section 11347.5, subdivision (a) in all respects stated.

DATE: June 11, 1990

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1. This Request for Determination was filed by Thomas Haas, City Attorney, City of Walnut Creek, P.O. Box 8039, 1666 North Main Street, Walnut Creek, California 94596, (415) 943-5800. The Department of Industrial Relations was represented by Richard A. Robyn, Counsel, Office of Director - Legal Unit, P.O. Box 603 San Francisco, California 94101, (415) 737-2900 S.F. or (916) 322-7110 Sacramento.

   To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "267" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

   In August 1989, a <u>second</u> survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

   Since August 1989, the following authorities have come to light:

   > (1) <u>Los Angeles v. Los Olivas Mobile Home P.</u> (1989) 213 Cal.App.3d 1427, 262 Cal.Rptr. 446, 449, the Second District Court of Appeal--citing <u>Jones v. Tracy School District</u> (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved)--refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing.

(2) Compare Developmental Disabilities Program, 64 Ops.Cal.Atty.Gen. 910 (1981) (Pre-11347.5 opinion found that Department of Developmental Services' "guidelines" to regional centers concerning the expenditure of their funds need not be adopted pursuant to the APA if viewed as non-mandatory administrative "suggestions") with Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 211 Cal.Rptr. 758 (court avoided the issue of whether DDS spending directives were underground regulations, deciding instead that the directives were not authorized by the Lanterman Act, were inconsistent with the Act, and were therefore void).

(3) California Coastal Commission v. Office of Administrative Law (1989) 210 Cal.App.3d 758, 258 Cal.Rptr. 560 (relying on a footnote in a 1980 California Supreme Court opinion, First District Court of Appeal, Division One, set aside 1986 OAL Determination No. 2 (California Coastal Commission, Docket No. 85-003) on grounds that challenged coastal development guidelines fell within scope of express statutory exception to APA requirements); review denied by California Supreme Court on August 31, 1989, two justices dissenting.

(4) Grier v. Kizer (April 1990) __ Cal.App.3d __, 268 Cal.Rptr. 244 (ord. mod. opn. May 2, 1990; app. pending) (giving "due deference" to 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016), the Second District Court of Appeal, Division Three, held that the statistical extrapolation rule used in Medi-Cal provider audits was an invalid and unenforceable underground regulation).

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

> "'Determination' means a finding by [OAL] as to whether a state agency rule is a [']regulation,['] as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable

unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a ['']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

5. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) __ Cal.Rptr. __, 268 Cal.Rptr. 244, (ord. mod. opn. May 2, 1990; app. pending). Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical

> extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" __ Cal.App.3d __, 268 Cal.Rptr. at 251.

In regard to the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." (Id.; emphasis added.)

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." (Emphasis added.)

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

6. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

OAL received no public comments on this Request for Determination.

The Department's Response to the Request for Determination was received by OAL on February 13, 1990, and was analyzed in this Determination.

7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

   The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for $3.00.

10. Statutes of 1921, chapter 604, section 1.

11. Statutes of 1927, chapter 440, section 1.

12. As gleaned from regulations commencing with section 15200 in Title 8, California Code of Regulations.

13. Labor Code section 3702.6.

14. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in

light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15. Labor Code section 55 provides the Director with broad general authority to run the Department. Labor Code section 55 states:

> "For the purpose of administration the director shall organize the [Department of Industrial Relations] subject to the approval of the Governor, in the manner he deems necessary properly to segregate and conduct the work of the department."

16. Section 3700 states in part:

> "Every employer except the state shall secure the payment of compensation in one or more of the following ways:
>
> (a) By being insured against liability to pay compensation in one or more insurers duly

authorized to write compensation insurance in this state.

(b) By securing from the Director of Industrial Relations a certificate of consent to self-insure, which may be given upon furnishing proof satisfactory to the Director of Industrial Relations of ability to self-insure and to pay any compensation that may become due to his employees.

(c) For any county, city, city and county, municipal corporation, public district, public agency or any political subdivision of the state, . . . by securing from the Director of Industrial Relations a certificate of consent to self-insure against workers' compensation claims, which certificate may be given upon furnishing proof satisfactory to the director of ability to administer workers' compensation claims properly, and to pay workers compensation claims that may become due to its employees. . . ." [Emphasis Added.]

17. Section 4850 states in part:

"Whenever any city policeman, . . . who is a member of the Public Employees Retirement System or subject to the County Employees Retirement Law of 1937 . . . is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city or county, to leave of absence while so disabled without loss of salary in lieu of temporary disability payments, if any, which would be payable under this chapter, for the period of the disability, but not exceeding one year, or until such earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments pursuant to Section 4850.3. . . ." [Emphasis added.]

18. Section 19871 states in part:

"(a) Except as provided in section 19871.2, when a state officer or employee is temporarily disabled by illness or injury arising out of and in the course of state employment, he or she shall become entitled, regardless of his or her period of service, to receive industrial disability leave and payments in lieu of workers' compensation temporary disability payments, and payments under Section 19863, for a period not exceeding 52 weeks

within two years from the first day of disability. Such payments shall be in the amount of the employees full pay less withholding based on his or her exemptions in effect on the date of his or her disability for federal income taxes, state income taxes, and social security taxes not to exceed 22 working days of disability subject to Section 19875. Thereafter, the payment shall be two-thirds of full pay. . . ." [Emphasis added.]

19. Section 89529.03 states in part:

"When an employee is temporarily disabled by illness or injury arising out of and in the course of state employment, he or she shall become entitled, regardless of his or her period of service, to receive industrial disability leave and payments, in lieu of workers compensation temporary disability payments and payment under Section 89527, for a period not exceeding 52 weeks within two years from the first day of disability. The payments shall be in the amount of the employee's full pay less withholding based on his or her exemptions in effect on the date of his or her disability for federal income taxes, state income taxes, and social security taxes not to exceed 22 working days of disability subject to section 89529.08. Thereafter, the pay shall be two-thirds of full pay. . . . " [Emphasis added.]

20. "State offices and employees" refers to those persons entitled to elect salary continuation payments pursuant to Government Code section 19871.

21. "State University employees" refers to those persons entitled to elect salary continuation payments pursuant to Education Code section 89529.03

22. "Safety employees" refers to those persons entitled to elect salary continuation payments pursuant to Labor Code section 4850.

23. See notes 20, 21 and 22 above.

24. Register 90, No. 9-Z, March 2, 1990, p. 346.

25. The legal memo states in part:

> "RESERVES
>
> Labor Code section 3701 provides, in pertinent part, that a "private self-insuring employer" shall deposit a minimum of 125% of the self-insurer's "future liability for compensation" plus 10% of the self-insurer's liability for all administrative and legal costs relating to the employer's self-insuring. Title 8, Code of Regulations, section 15300(a) further provides that each indemnity case listed on the self-insurer's annual report "shall be estimated on the basis of computations which will develop the total future cost of compensation benefits due or potentially due".
>
> Pursuant to the above, 'salary continuance' should be included in reserves if it constitutes future liability for 'compensation benefits'."

26. The significant distinction between public self-insured employers and private self-insured employers is that the private self-insured employer is required to make a deposit of security to ensure payment of compensation and the performance of workers' compensation obligations. The public self-insurer is not required to make such a deposit, but is required instead to furnish proof of the ability to administer workers' compensation claims properly. (See Labor Code sections 3700 and 3701.)

27. The Memorandum refers to the requirement of reserving for and paying statutory salary continuation benefits at least five times. The Memorandum is entitled, "Payment of and Reserving For Statutory Salary Continuation Benefits". The first paragraph of the Memorandum states, "Our office has notices particular problems . . . regarding proper payment of and reserving for Statutory Salary Continuation payments. . . ." (Emphasis added.) The third paragraph states in relevant part, "Public self-insurers will need to reserve for and pay the higher 'salary in lieu of temporary disability benefit'. . . ." (Emphasis added.) Paragraph five states "Self-Insurance Plans agrees . . . that reserving for benefit payable under Labor Code section 4850, Government Code sections 19869 et seq., and Education Code section 89529 et seq. is statutorily required for all qualifying claimants." (Emphasis added.) Finally, paragraph six states in part "Where public self-insurers have not accurately reflected the reserves on claims prior to the fiscal year 1988-89, our audits will point these out where we find them." (Emphasis added.)

28. The American Heritage Dictionary of the English Language (New College Edition 1980) p. 1106.

29. Page 4 of the Department's response states in part as follows:

> ". . . It appears the City of Walnut Creek has erroneously interpreted DIR's memorandum to require the setting aside of funds into a single dedicated account."

30. Page 4 of the Department's response to the Request for Determination states in part:

> "DIR does not require a public agency to actually set aside funds for payment of workers' compensation benefits under LC section 4850 into one or more accounts (i.e., another definition of 'reserving'). Rather, DIR only requires full reporting of all benefits paid and all liabilities incurred . . . ." (see also footnote 28 above.)

31. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

32. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

33. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in

quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

34. By "specific," we mean an exemption which pertains solely to one specific program or to one specific agency, such as the statute stating that the rule setting the California minimum wage is exempt from APA requirements (Labor Code section 1185). A specific exemption contrasts with a "general" exemption or exception, which applies across-the-board to all agency enactments of a certain type, such as those listed in note 53.

35. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

36. See, for example, Winzler & Kelly v. Department of Industrial Relations (1981), 121 Cal.App. 3d 120, 128, 174 Cal.Rptr. 744, 747.

37. See, for example, Labor Code sections 3700 through 3702.10.

38. See Labor Code section 3702.

39. (1952) 111 Cal.App.2d 723, 245 P.2d 352.

40. See notes 20, 21 and 22 above.

41. It is not our intent to examine the Department's authority to adopt regulations to implement, interpret or make specific the provisions of Government Code section 19871 and Education Code section 89529.03. It is sufficient for purposes of this Determination that we recognize that the agency's policies do in fact implement, interpret or make specific these statutory provisions.

42. The Bill analysis (issued August 16, 1978 by the Department of Finance) of AB 840, a bill concerning the regulation of legally uninsured public agencies, describes the effect of the Bill's revisions on local governmental entities as requiring them to insure or to obtain a certificate of consent to self-insure. Furthermore, the analysis states that local government entities would not be subject to section 3701 of the Labor Code which obligates private self-insurers to deposit security with the state. It was the 1978 amendment of section that specifically inserted the

word "private" preceding the term "self-insuring employer" in order to retain the deposit of security requirement for private self-insurers only.

43. (1952) 111 Cal.App.2d 723, 728.

44. E.g., Id., Mannetter v. County of Marin (1976) 62 Cal.App.3d 518, 133 Cal.Rptr.119., Boyd v. City of Santa Ana (1971) 6 Cal.3d 393, 99 Cal.Rptr. 38.

45. (1952) 111 Cal.App.2d 723, 727.

46. Section 19871.

47. Section 89529.03.

48. See Grier v. Kizer (1990) ____ Cal.App.3d____, 268 Cal.Rptr. 244; Order modifying opinion May 2, 1990; app. pending

See 1988 OAL Determination No. 10 (Department of Corrections June 22, 1988), California Regulatory Notice Register 88, No. 28-Z, July 8, 1988, pp. 2313-2333.

Compare 1988 OAL Determination No. 1 (Board of Prison Terms, February 16, 1988), California Regulatory Notice Register 88, No. 9-Z, February 26, 1988, p. 644, n. 52; typewritten version, p. 22, n. 52 (OAL determined that BPT Administrative Directive No. 87/4 was a "regulation," in part because the issue of entitlement was subject to two legally viable interpretations, one contained in a Department of Corrections regulation, the other in Administrative Directive 87/4). A similar situation was involved in 1988 OAL Determination No. 9 (Department of Industrial Relations, June 9, 1988), California Regulatory Notice Register 88, No. 26-Z, June 24, 1988, P. 2169; typewritten version, p. 10 (part of challenged rule applying to claims arising prior to clarifying statutory amendment violated Gov. Code sec. 11347.5; other part of challenged rule concerning application of legislative scheme to claims arising after effective date of amendment did not violate Gov. Code sec. 11347.5).

49. Cal.Code Regs., tit. 8, sections 15400. See also, Cal.Code Regs., tit. 8, sections 15251, 15252 and 15300.

50. Goleta Valley Community Hospital v. State Department of Health Services (1983) 149 Cal.App.3d 1124, 197 Cal.Rptr. 294.

51. Compare 1989 OAL Determination No. 14 (Department of Corrections September 21, 1989) California Regulatory Notice Register 89, No. 40-Z, October 6, 1989, pp. 2947-2959.

52. Government Code section 11346.

53. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

    c. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

    d. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

    e. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

    f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California

Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5.

The above listing is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

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